law which the parties intend shall govern, usually the law of the country to which the ship belongs. Fifth, that it is immaterial whether the action is in tort or contract, and that the rights and liabilities of the parties should be fixed by the general maritime law as interpreted by the courts of the forum.

The first rule is objectionable because it is inexpedient from a practical standpoint and has usually been bitterly opposed by foreign shipping interests. The third rule is satisfactory where the seaman is shipped in the home port, and it has the advantage of certainty, but there will inevitably arise cases where its strict application will work hardship. The fifth rule in its application too often degenerates into the application of the first rule under different phraseology. Either the second or the fourth rules would seem most capable of practical application.

Since many of the states have adopted employers' liability laws and some foreign countries have benefit or compensation laws for the seamen in their merchant marine it has become necessary to decide which statute governs. Some of these statutes contain very drastic provisions which can only be justified on the grounds that some of the burden is taken from the employer's shoulders by some form of insurance. Must a shipowner insure under or contribute to the compensation laws of every port which by any chance his vessel may ever enter? It would seem that if there is a compensation statute provided by the law of the country to which the ship belongs, seamen signing articles to serve on board the vessel would be held impliedly to agree to accept the provisions of that statute.[10] But in the case of an employer's liability statute of the port which a foreign ship enters neither employer nor seaman have ever contracted with reference to it.

O. K. P.

DAMAGES: DELAY IN DELIVERY OF TELEGRAM.—Plaintiff, the exclusive sales agent in California of a firm in Ohio filed a bid for the construction of the metal furniture in Agriculture Hall at the University of California. This bid was slightly above that of the only other bidder, to whom the award was given; but had a telegram from his principal announcing a reduction in prices been delivered to plaintiff within a reasonable time, he would have been able to have filed a bid $500 below that which was accepted. Plaintiff averred that in such a case the contract would have been awarded to his firm, for by law the Regents of the University are required to award a contract for construction work to the lowest responsible bidder or to reject "any bid and advertise anew."[1] In

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[10] As to the nature of employer's liability statutes, see **Berton v.** Tietzen & Lang Dry Dock Co. (Jan 13, 1915), 219 Fed. 763.

[1] Cal. Pol. Code, § 1438. "The construction and furnishing of the buildings must be let to the lowest responsible bidder . . . . but the regents may reject any bid and advertise anew."

McQuilkin v. The Postal Telegraph Cable Company[2] a demurrer to a complaint embodying the above facts was sustained. The court held that the damages for which compensation was asked were too remote and contingent to form the basis of a cause of action, inasmuch as the discretion of a third party to make or not to make the contract intervened.

It is interesting to note the effect of section 1438 of the Political Code upon the "discretion of a third party (the Regents) to make or not to make the contract." It would seem that this section which directs the Regents to award the contract to the lowest bidder or "to reject any bid and advertise anew," would so circumscribe the discretion of the Regents as to make it practically certain what their action would be. According to authority, however, their discretion, if bona fide exercised, still remains. Statutes of a similar nature made applicable to municipal corporations have been held to vest a discretionary and judicial and not a ministerial function.[3] Especially is this so when the words "lowest responsible bidder" are included in the statute.[4] Thus, it is held that no mandamus proceedings will lie in favor of the lowest bidder to compel the awarding of the contract to him.[5] Nor will an injunction issue to prevent the giving of the award to a higher bidder.[6] The code section in question, though couched in mandatory terms, is at most directory in nature and vests a discretionary power.

The ruling of the court, that damages cannot be said to be the direct and necessary result of the delay when the discretion of a third party intervenes, is upheld in many jurisdictions.[7] The application of this rule to given cases at times leaves a plaintiff without remedy even where damage is reduced to a practical certainty. Thus, in the present case, even though the discretion of the Regents intervened, as a practical matter it is highly probable that the award would have been given to the plaintiff's firm. Whether the Regents would have reached this conclusion it is submitted, should have been held to be a matter of fact. It has so been regarded by many courts and recovery has been upheld notwithstanding the fact that any benefit which the plaintiff, the recipient

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[2] (June 19, 1915), 20 Cal. App. Dec. 1042.

[3] Interstate, etc. Co. v. City of Philadelphia (1894), 164 Pa. St. 477, 30 Atl. 383; United States Wood, etc. Co. v. Sundmaker (1911), 186 Fed. 678.

[4] Johnson v. Sanitary District (1896), 163 Ill. 285, 45 N. E. 104.

[5] State v. McGrath (1886), 91 Mo. 386, 3 S. W. 846; State v. Herman (1906), 63 Ohio St. 440, 59 N. E. 104; 4 Dillon, Municipal Corporations, 264, n.

[6] Interstate, etc. Co. v. City of Philadelphia (1894), 164 Pa. St. 477, 30 Atl. 383.

[7] Beatty Lumber Co. v. Western Union Tel. Co. (1903), 52 W. Va. 410, 44 S. E. 309; Hall v. Western Union Tel. Co. (1910, 59 Fla. 275, 51 So. 819; Western Union Tel. Co. v. Adams Machine Co. (1908), 92 Miss. 849, 47 So. 412.

of the telegram, might have received, had the telegram been properly delivered, was dependent upon some act to be performed by a third person.[8] In such cases it is a matter of fact as to whether the third party would have so acted as to benefit the plaintiff; and his testimony is admissible as evidence.[9] It is submitted that this is the proper attitude, that the law should favor the innocent party and not be too lenient with the wrongdoer as the defendant in the principal case admittedly is.

M. W.

EMINENT DOMAIN: LIABILITY FOR VALUE OF FIXTURES PLACED ON LAND BY A TRESPASSER IN SUBSEQUENT CONDEMNATION PROCEEDINGS.—A landowner is entitled to the value of any fixtures placed on his land by a trespasser. The reasons given are that the latter in annexing his chattels to the soil presumably intended to use them as part of the land, and that he cannot reclaim them without committing another trespass. Regardless of his good faith he cannot recover the fixtures or their value, though a bona fide disseisor may set off the value of beneficial improvements if sued by the owner for mesne profits.[1] But when a railroad, or other body endowed with the power of eminent domain, tortiously enters on the land of another, lays tracks, or places other fixtures on the land, an exception to the above rule is allowed to the extent of holding the landowner entitled to recover only the value of the land actually taken, without considering the value added by the improvements if the trespasser resorts to condemnation proceedings to obtain title to the property. This rule is established by a great weight of authority, and is followed in *Atchison, Topeka & Santa Fe Railway Company v. Richter.*[2] New York, and a few other jurisdictions hold that the trespasser loses his property in the fixtures and is bound to pay their value in the condemnation proceedings.[3] California recognizes the prevailing view, at least where the trespass is unaccompanied by force,[4] although one case holds that where entry is forcibly made

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[8] Western Union Tel. Co. v. Caldwell (1907), 126 Ky. 42, 102 S. W. 840, 12 L. R. A. (N. S.) 749; Kerns v. Western Union Tel. Co. (Mo., 1913), 160 S. W. 556; Cain v. Western Union Tel. Co. (1913), 89 Kans. 797, 133 Pac. 874.

[9] Elam v. Western Union Tel. Co. (1905), 113 Mo. App. 538, 88 S. W. 115; Carter v. Western Union Tel. Co. (1906), 141 N. C. 374, 54 S. E. 274; Western Union Tel. Co. v. Sights (1912), 34 Okla. 461, 126 Pac. 234.

[1] Ewell on Fixtures, 2d ed., p. 79.

[2] (N. Mex., Jan. 12, 1915), 148 Pac. 478. Rehearing denied March 10, 1915. See also Ewell on Fixtures, 2d ed., pp. 88-90; Lewis on Eminent Domain, 3d ed., § 759, and cases there cited.

[3] Village of St. Johnsville v. Smith (1906), 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922, 6 Ann. Cas. 379. See also cases cited in Lewis on Eminent Domain, 3d ed., § 759.

[4] Cal. P. R. R. Co. v. Armstrong (1873), 46 Cal. 85.